

No. 48709-8-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE PERSONAL RESTRAINT PETITION OF

RONALD MENDES,

PETITIONER.

**REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

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A. INTRODUCTION

Ronald Mendes claimed he acted in self-defense when he shot and killed Danny Saylor after Saylor came at Mendes with a baseball bat. In closing, the prosecutor argued that self-defense was a comparative analysis, that jurors must determine whether the shooting was Saylor's "fault" or whether Saylor was instead "doing what any other homeowner may have done in that same situation." RP 1345-51. The prosecutor characterized Mendes's self-defense evidence as "trying to lay the blame on Danny Saylor." *Id.*

The prosecutor's argument misstated the law of self-defense. The prosecutor's argument also negated any opportunity for Mendes to claim a right to revived self-defense, even if Mendes was "fleeing from" the earlier assault in the second degree. If jurors found that Mendes "did he then shoot and kill Danny Saylor," then the elements of felony murder were established—even if Mendes was attempting to retreat from the earlier assault.

The prosecutor misstated the law in several other significant respects. A prosecutor's argument that misstates or shifts the burden to the defense is improper and amounts to flagrant and ill-intentioned misconduct. *In re Pers. Restraint of Glasmann*, 175 Wash.2d 696, 713, 286 P.3d 673 (2012). That is precisely what happened here. Trial counsel, who was previously found ineffective in this case but was reappointed, deficiently failed to object to any of the numerous instances of misconduct, serving to increase the prejudice.

Mr. Mendes is entitled to a new trial because his trial was far from fair.

B. ARGUMENT

1. The Prosecutor's Argument Misstated the Law in Numerous Respects. Trial Counsel's Failure to Object was Ineffective.

Mr. Mendes replies on his first two misconduct claims, as well as his ineffectiveness claims, here.

Self Defense Does Not Involve a Comparison of Culpability

The prosecutor repeatedly asked the jury to compare the culpability of Mendes and Saylor and argued that Saylor's actions were justified, making Mendes guilty. Several times the prosecutor implored jurors to decide that Saylor was doing what any homeowner would do. If jurors agreed, the prosecutor asserted that Mendes was guilty. In its *Response*, the State argues that self-defense makes the actions of the victim relevant.

The State is partially correct. But, it is the prosecutor's failure to acknowledge that Mendes could have acted in self-defense even if Saylor was not blameworthy that constituted an incorrect and prejudicial statement.

What a person may do in self-defense depends to a large degree on what the aggressor attempted to do to that person; *i.e.*, the scope of justified behavior is fundamentally determined by the acts of the victim. But, what matters for self-defense is the kind of threat posed by the victim-aggressor, not the moral culpability of the deceased. Self-defense requires jurors to look to the

victim's conduct to determine whether the defendant was right in his response to it. But, self-defense can exist even where the deceased is morally faultless.

A defendant is justified if he kills a person who attacks him in mistaken self-defense, erroneously believing that she is about to be attacked by him. Moreover, he may be justified even if he kills a sleepwalking aggressor, *i.e.*, someone who has committed no voluntary act at all. Washington courts have held that a person may use force to repel an assault if he reasonably believes danger is imminent. *State v. Miller*, 141 Wash. 104, 250 P. 645 (1926); *State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993).

“This jury instruction applies to Danny Saylor.”

The prosecutor told jurors that the “no duty to retreat” instruction applied to Saylor. It did not. The instruction only applied to Mendes. The State’s *Response* does not specifically address this argument, other than to generally argue that Saylor’s actions were justified.

The problem with this argument, in addition to making self-defense a comparative analysis, is that it alters the self-defense equation from whether Mendes reasonably feared death or serious injury to whether Saylor’s actions were lawful. But, the prosecutor went further.

*“We see these types of cases during the year a few times, and the homeowner gets to defend themselves.” *

The State also fails to respond to this argument. Here, the prosecutor improperly places the experience and prestige of the prosecutor’s office on the

side of Saylor, by arguing that jurors should trust the experienced judgment of the prosecutor's office. In other words, the prosecutor argued that the prosecutor's office has facts that the jury does not and jurors should rely on that expertise.

Lawn v. United States, 355 U.S. 339 359 n.15 (1958).

"(W)ould you have done what the defendant did if you knew what he knew?"

The *Response* also fails to attempt to justify this argument, which misstates the reasonable person standard. Evidence of self-defense is evaluated "from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." *Janes*, 121 Wash.2d at 238. Accordingly, the degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. *See State v. Bailey*, 22 Wash.App. 646, 650, 591 P.2d 1212 (1979). It is not a "every juror applies their own subjective standard" test.

"It was when the defendant was fleeing from that assault in the second degree did he then shoot and kill Danny Saylor. Because it was in the flight therefrom, the law says that you can be held accountable for someone's death when you are immediately fleeing from another felony."

This argument, which the *Response* also fails to specifically defend, eliminates self-defense by mischaracterizing the standard as: even if Mendes was retreating or withdrawing his "retreat" also constitutes "fleeing." If jurors accepted this unobjected to statement of the law, then Mendes had no right to self-defense.

This Court reversed on the direct appeal from Mendes's first trial on the grounds that Mendes was entitled to a revived self-defense instruction:

This error also impacts the felony murder conviction. If properly instructed, the jury could have concluded under the revived self-defense instruction that Mendes acted in self-defense. If so, the killing was lawful and he is not guilty of felony murder. RCW 9A.16.050. We reverse the felony murder conviction in count II.

State v. Mendes, Not Reported in P.3d 156 Wash.App. 1059 (2010).

The prosecutor's argument returned Mendes to essentially the same position he was in on direct appeal, eliminating the revived self-defense instruction.

Given that this was a close case, the prosecutor's argument was harmful. *See e.g., State v. Cowen*, 87 Wn.App. 45, 50-52, 939 P.2d 1249 (1997) (ambiguity created by single incorrect self-defense instruction could affect verdict and requires reversal).

Given that this was a close case, Mendes was prejudiced by trial counsel's deficient performance. An attorney's deficient performance requires reversal when there is a reasonable probability that the outcome could have been different without the error. *Strickland*, 466 U.S. at 694; *In re Pers. Restraint of Hubert*, 138 Wn.App. 924, 932, 158 P.3d 1282 (2007) (reversing for ineffective assistance where court's instructions did not make available defense "inevitabl[y]" apparent). A defendant is not required to prove that he would not have been convicted but for the error. *See e.g., House v. Bell*, 547 U.S. 518, 552-53 (2006) (reversing for ineffective assistance based on new evidence where, even though jury might

disregard new evidence, it “would likely reinforce doubts” as to defendant's guilt). The reasonable probability standard requires only that the error was sufficiently material that it undermines confidence in the jury's verdict. *Nix v. Whiteside*, 475 U.S. 157, 175 (1986).

Reversal is required.

3. The Reappointment of Counsel Who Had Been Found Ineffective in this Case Created a Conflict of Interest.

After a finding of ineffectiveness, Mr. Mendes’s case was returned for a new trial. The same lawyer who had already been found ineffective was reappointed to his case. The State argues that this is entirely proper; that the previous finding of ineffectiveness only created a presumption of prejudice and did not create an actual conflict. *Response*, p. 9.

Although Mendes disagrees, Mr. Mendes will accept the State’s concession that the prior finding creates a presumption of prejudice. However, that presumption of prejudice mandates an evidentiary hearing, rather than the surmise that the State puts forward. *See e.g., In re PRP of Khan*, 184 Wash.2d 679, 692, 363 P.3d 577 (2015). If this Court does not grant this petition on the grounds advanced in Claims 1-2, it should remand the ineffectiveness sub-parts to those claims and Claim 3 for an evidentiary hearing.

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D. CONCLUSION

For the remaining claims, Mr. Mendes rests on the arguments already made. Based on the above, this Court should either grant the PRP or remand for an evidentiary hearing.

DATED this 5th day of September, 2016.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis certify that on today's date I efiled this reply brief causing a copy to be sent electronically to opposing counsel at:

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September 5, 2016//Portland, OR

/s/Jeffrey Ellis

ALSEPT & ELLIS LAW OFFICE

September 05, 2016 - 9:57 AM

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